APPENDIX F

[Filed September 8, 1998]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. **ROBERT EARL KENNEDY,** Defendant and Appellant.	D027718 (Super. Ct. No. SCD 116399)

APPEAL from a judgment of the Superior Court of San Diego County, Kenneth K. So, Judge. Affirmed.

Robert Earl Kennedy appeals a judgment convicting him of selling a substance in lieu of a controlled narcotic substance (Health & Saf. Code, § 11355). The court also found Kennedy had two no probation prior convictions (Pen. Code, [1] § 1203, subd. (e)(4)), two prison prior convictions (§ 667.5, subd. (b)), and two prior serious or violent felony convictions (§ 667, subds. (b)-(i)). The court sentenced him to a term of 25 years to life.

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1. All statutory references are to the Penal Code unless otherwise specified.

Kennedy contends the judgment must be reversed because the court denied his request for complete transcript of the proceedings of his first trial which had resulted in a mistrial. He claims this denial violated his equal protection rights and his right to self-representation. He also argues he was entitled to a judgment of acquittal at the close of the People's case-in-chief on the ground of insufficient evidence; the evidence was insufficient to show he agreed to sell a controlled substance and had knowledge a substitute was delivered; the court erred in instructing the jury only general intent is necessary for commission of the crime; his counsel was ineffective for failing to request an instruction on a lesser related offense; his conviction is precluded by provisions of Health and Safety Code section 109575, which deals with distribution of an imitation controlled substance; and the court improperly admitted evidence that his accomplice was convicted of the same crime, and that Kennedy was in custody and had been a gang member. He also asserts resentencing is required because his counsel did not request his current offense be reduced to a misdemeanor, his sentence is cruel and unusual, and the three strikes law is unconstitutionally vague.

We affirm.

I

On the afternoon of October 17, 1995, Police Detective LeRoy McDowell was working an undercover operation in an area known for rock cocaine sales. When McDowell saw Kennedy and Randall Tucker across the street, he made eye contact with Kennedy and nodded his head to indicate he was asking if Kennedy was selling a controlled substance. Kennedy gestured for McDowell to cross the street.

McDowell approached and asked, "Are you serving?", meaning in street terminology "are you selling a controlled

substance? Tucker responded, "What?" McDowell asked the question again. Tucker said, "What do you want?" McDowell said he wanted a "2-0," which generally means $20 of rock cocaine or another controlled substance. Tucker asked, "2-0 of what?" and McDowell repeated,"[A] 2-0."

Kennedy asked for money. McDowell took a prerecorded $20 bill from his pocket and gave it to him. Kennedy put the bill in his pocket and said to Tucker, "Give it to him, cuz." Tucker walked over to a nearby fence, picked up a piece of paper bag and handed it to McDowell. Inside the bag were pieces of an off-white, rock-like substance.

McDowell told Tucker it was not enough; to give him more or give part of his money back. Kennedy told McDowell to come back later. Tucker asked if he were a police officer. McDowell walked away.

Police arrested Kennedy and Tucker. In Kennedy's pocket they found a $20 bill with numbers which previously had been recorded. The bag contained .08 grams of a noncontrolled substance.

Defense Case

Tucker testified he and Kennedy had been in the area all day and earlier had been contacted and patted down by police.

Tucker testified he saw McDowell, who said "2-0" from across the street two or three times. Tucker testified he said,"No,"and shook his head, but McDowell crossed the street and twice asked for a 2-0.

Tucker said no drugs were mentioned, but he noticed McDowell had money in his hand. McDowell handed the money to Tucker. Tucker said McDowell was "pushing too

much" so he walked over to a dirt area and picked up a piece of paper bag, which he gave to McDowell. He said McDowell protested it was not a 2-0, but Tucker said it was all he had. Tucker said "2-0" and "are you serving" can mean different things and he did not know what McDowell wanted.

II

Kennedy contends automatic reversal is required because the court refused his request for a complete transcript of his first trial, in which the jury was unable to reach a verdict. At the close of that trial on March 7, 1996, Kennedy's defense attorney requested a transcript be prepared. When the court ordered preparation of the trial testimony only, Kennedy's attorney, "that's fine."

Kennedy later elected to represent himself and new counsel was appointed to advise him. On September 26, the court ascertained the trial testimony had been transcribed and apparently given to Kennedy and denied Kennedy's request for a more complete transcript, including motion hearings, opening statements, and closing arguments. A month later, just before the second trial, Kennedy relinquished his right to represent himself and the court appointed his advisor as trial counsel.

An indigent defendant is presumed to have need of a transcript of the proceedings of his earlier trial in order to present an effective defense. (*People v. Hosner* (1975) 15 Cal. 3d 60, 64.) It is the People's burden to show under the particular circumstances of the case the defendant is able to present an effective defense absent a transcript. (*Ibid.*) The prosecution's burden is to overcome the presumption of need or, alternatively, to show the "'"availability of alternative devices that would fulfill the same functions of a transcript."'" (*People v. Tarver* (1991) 228 Cal. App. 3d 954, 957, quoting *People v. Hosner, supra*, 15 Cal.3d at p. 65.)

In *Hosner,* the court ruled "the erroneous denial of an indigent defendant's motion for a trial requires automatic reversal." (*People v. Hosner, supra,* 15Cal.3d at p. 70.) The court explained, "in the manner of the denial of the assistance of counsel, the denial of a transcript of a former trial infects all the evidence offered at the latter trial, for there is no way of knowing to what extent adroit counsel assisted by the transcript to which the defendant was entitled might have been able to impeach or rebut any given item of evidence." (*Ibid.; see also People v. Bigelow* (1984) 37Cal.3d 731, 745.)

Here, assuming Kennedy's request for the additional portions of the transcript was timely, the court should have provided it. We cannot, however, hold denial of the request for the additional material was reversible error. In providing a transcript of the testimony, the court substantially complied with the *Hosner* requirement. In contrast to *Hosner,* where the defendant was entirely denied a transcript of his prior trial, Kennedy *was* afforded a free transcript of all the testimony. He thus had available those crucial portions which might be necessary, as suggested *in Hosner,* for the purposes of impeaching witnesses and rebutting evidence. We decline to extend the rule in *Hosner* to require per se reversal when, with defense counsel's acquiescence, the court provides to an indigent defendant a transcript of all the trial testimony, but denies a later request for the additional portions of the transcript.

Kennedy has not shown the court's denial of his request for the additional portions of the trial was prejudicial. As an example of prejudice Kennedy points only to the fact that before the first trial defense counsel requested that if Kennedy's statement to a police officer Mendez was mentioned, that any gang reference be excised. She asked that the prosecutor admonish Mendez not to "blurt it out" on the witness stand. The prosecutor stated such was his intention and he had

mentioned it to Mendez. He noted the evidence could become relevant should Kennedy and Tucker minimize their relationship with each other. The court indicated gang membership would not be mentioned, unless it became relevant during trial. Mendez did not testify at the second trial. Detective McDowell, however, testified after he gave Kennedy the $20, Kennedy said to Tucker, "Give it to him, cuz," and explained the term "cuz" was used by a lot of people, "but basically [by] gang members and those that [sic] want to be gang members." The prosecutor questioned whether the term was used to refer to someone from one's own neighborhood, and McDowell agreed. This allusion to gang membership was not significant. Kennedy has not shown prejudice. Any error in not providing the additional portions of the transcript was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386U.S. 18, 24.)

III

Kennedy contends the court's refusal to order the additional portions of the transcript forced him to forfeit his right to "self-representation and required him to have new counsel takeover his defense on the same day as the retrial began. He claims had the court conducted a complete inquiry into his decision it would have learned his waiver of his right of self-representation was not voluntary, but coerced by the court's denial.

This contention is without merit. As explained above, the court's refusal to provide a full transcript is not reversible error. Further, when Kennedy decided to give up his right to self-representation arid chose to be represented by his advisory counsel, he offered no reason for his action. Nothing in the record supports his present assertion he decided not to represent himself because the court did not provide him with the additional material he requested.

IV

Kennedy asserts the court erred in failing to grant his motion for acquittal at the close of the prosecution's case-in-chief when the evidence presented up to that time did not support a conviction.

On a motion for acquittal under section 1118.1 the trial court must employ the same test as that applied by an appellate court in determining whether the evidence supports a conviction. (*People v. Bloyd* (1987) 43 Cal. 3d 333, 350.) The court must decide "'whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged [citations].'" (*People v. Rice* (1988) 200 Cal. App. 3d 647, 651, quoting *People v. Valerio* (1970) 13 Cal. App. 3d 912, 919.) "Where the trial court has denied the motion, the appellate court must assume in favor of the judgment every fact from which the jury could have reasonably deduced from the evidence that the offense was by the defendant." (*People v. Rice, supra,* 200 Cal. App. 3d at p. 651.) On appeal the test is not whether the evidence at trial established the defendant's guilt beyond a reasonable doubt, but whether "'"any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'" (*Ibid.*, quoting *People v. Towler* (1982) 31Cal. 3d 105, 117.)

The court did not err in denying Kennedy's motion for acquittal under section 1118.1. First, contrary to Kennedy's argument that he was not a direct perpetrator, McDowell did not deal only with Tucker. Kennedy did participate in the sale. When McDowell looked across the street, he first made eye contact with Kennedy, nodding toward him, indicating he was asking Kennedy if he were selling drugs, and Kennedy signaled to him to cross the street. After McDowell came across, Tucker asked him what he wanted and McDowell said he

wanted a 2-0. Kennedy took McDowell's money and told Tucker to "give it to him, cuz" When McDowell complained it was not enough, Kennedy told him to comeback later.

Kennedy's arguments there was no evidence he agreed to make a sale or aided and abetted the sale also are without merit. After McDowell asked for a 2-0, Kennedy accepted his money and directed Tucker to give it to him. It is reasonable to interpret these actions as an agreement and sale. The court properly denied the motion.

V

Kennedy also maintains the evidence introduced during the entire trial is insufficient to support the conviction.

In reviewing the record to determine whether a verdict is supported by the evidence, an appellate court

> "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal. 3d 557, 578.)

Review is not limited to the evidence supporting the respondent, however. The court must look at the whole record and determine whether evidence of each essential element is substantial. (*Id.* at p. 577.) "The reviewing court presumes in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence." (*People v. Bloom* (1989) 48 Cal. 3d1194, 1208.)

The evidence supports the jury's verdict Kennedy sold a substance in lieu of a controlled substance. His acceptance of the $20 after McDowell had asked for a 2-0 is consistent with an agreement to sell drugs. It is not significant that the police did not find any drugs. He was convicted of selling a noncontrolled substance in the guise of an illicit substance. Substantial evidence supports the judgment.

VI

Kennedy next maintains the court prejudicially erred by instructing that only general intent is necessary for commission of the charged crime.

We first note during discussion on jury instructions the defense objected to the giving of CALJIC No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State). The prosecutor stated the instruction was not necessary because the crime was one of general intent and defense counsel said, "That's true." When the judge stated he would instruct with CALJIC No. 3.30 (Concurrence of Act and General Criminal Intent), the attorneys made no comment. It is arguable that the defense's objection to the giving of an instruction on specific intent precludes any claim of error on appeal. (*See People v. Barnard* (1982) 138 Cal. App. 3d 400, 409-410.)

In any event, the court properly instructed on the issue. When a controlled substance is offered for sale and a substitutes delivered the crime requires only a general intent. A specific intent to substitute a noncontrolled substance is an element of the crime only when delivery is not effected. (*People v. Lecblinski* (1976) 60 Cal. App. 3d 766, 769.)

The California Supreme Court stated in *People v. McDaniel* (1979) 24 Cal. 3d 661, 669, when a conviction of Health and Safety Code section 11355 is based on an offer to sell a

controlled substance, but no substance is actually delivered, the crime requires an intent to do some further act, so is a specific intent crime. The court stated,

> "'"When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve same additional consequence, the crime is deemed to be one of specific intent."'" (*Id.* at p. 669, quoting *People v. Daniels* (1975) 14 Cal. 3d 857, 860.)

The court in *People v. Lechlinski, supra*, 60 Cal.App.3d at page 769 held sale and delivery of a substance in lieu of a controlled substance is a general intent crime. The Supreme Court in *McDaniel* ruled the holding in *Lechlinski* is not inconsistent with its ruling in *McDaniel*. (*People v. McDaniel, supra,* 24 Cal. 3d at p. 670.) *People v. Sweet* (1967) 257Cal. App. 2d 167, 171; *People v. Contreras* (1964) 226 Cal. App. 2d 700, 702; and *People v. Lopez* (1963) 213 Cal. App. 2d 668, 675, upon which Kennedy relies for his argument specific intent is an element of the crime, all predate *McDaniel* and are inconsistent with *Lechlinski.* When a noncontrolled substance is not delivered there must be proof the defendant specifically intended to deliver a substance other than a controlled substance. But, if the noncontrolled substance is delivered, the crime does not require any intent to do a further actor achieve a further consequence. The only question is whether the defendant harbored the general intent to do the criminal act.

VII

Kennedy contends he was denied effective assistance of counsel when his attorney failed to request the court to instruct on the lesser related misdemeanor offense of distributing an imitation controlled substance (Health & Safe Code, § 109575).

Kennedy's attorney was not ineffective for failing to request the instruction. Our Supreme Court in *People v. Birks* (Aug. 31, 1998, No. S057191) ___ Cal. 4th ___ [98 L.A. Daily J.D.A.R. 9346] recently held a defendant is not entitled to instructions on lesser related offenses even upon request. Moreoer, distribution of an imitation controlled substance is not a lesser related offense of selling a substance in lieu of a controlled substance, but lesser only in terms of penalty. (*People v. Hill* (1992) 6 Cal. App. 4th 33, 44.) Under established case law Kennedy was not entitled to the instruction. Trial counsel "'is not required to make futile objections or motions merely to create a record impregnable to assault for claimed inadequacy of counsel.'" (*People v. Harpool*, (1984) 155Cal. App. 3d 877, 886.) Kennedy's counsel was not ineffective for failing to request it.

VIII

Kennedy asserts Health and Safety Code section 109575 is a special statute which preempts or acts as an exception to prosecution under the more general provisions of Health and Safety Code section 11355. He argues his conviction of violating Health and Safety code section 11355 is thus precluded by Health and Safety Code section 109575.

> "'"[W]here the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as the exception to the general statute whether it was passed before or after such general enactment."'" (*People v. Jenkins* (1983) 28

Cal. 3d 494, 501, quoting *In re Williamson* (1954) 43Cal. 2d 651, 654.)

"A special statute does not supplant a general statute unless all of the requirements of the general statute are covered in the special statute." (*People v. Isaac* (1976) 56 Cal. App. 3d 679,683.)

Kennedy's conviction of violating Health and Safety Code section 11355 is not precluded by section 109575 of that code. Health and Safety Code section 109575 prohibits the knowing manufacture, distribution or possession with intent to distribute an imitation controlled substance. Health and Safety Code section 11355 prohibits offering to sell, furnish, transport, administer or give a controlled substance and then providing another substance in lieu of the controlled substance. The provider need not know the in lieu substance is a noncontrolled substance. Although the conduct prohibited under the two statutes is related, neither one is more specific or more general than the other. Kennedy's conviction of violating Health and Safety Code section 11355 is not precluded by section 109575 of the same code.

IX

Kennedy next asserts reversal is required because the prosecutor was allowed to introduce evidence his accomplice (Tucker) was convicted of the same offense for which Kennedy was on trial. He argues the trial court failed to weigh probative value of the evidence against its potential prejudice and admission of the evidence was prejudicial.

Tucker testified for the defense. He said when McDowell said "2-0", he answered, "no." He denied McDowell asked if he was serving, or that Kennedy said, "Give it to him, cuz." Tucker said he gave McDowell the piece of paper bag to get rid

of him, not with any intent to sell "bunk," nor with any representation as to its contents. During cross-examination of Tucker, the prosecutor, over defense objections, was allowed to ask Tucker whether he had been convicted of "this offense" to impeach his testimony that he had not participated in criminal activity on this occasion. Tucker said, "Yes."

Evidence Code section 352 provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption or time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Absent a clear showing of abuse, the trial court's exercise of discretion under this section will not be reversed. (*People v. Burrell-Hart* (1987) 192 Cal. App. 3d 593, 599.)

After the defense objected to the prosecutor asking Tucker about his guilty plea, the court asked whether the prosecutor was simply going to ask if he had been convicted of the crime, noting the defense's objection. The court's questioning shows it weighed the relevant factors before allowing proof of Tucker's conviction to impeach his testimony that he had committed no crime related to Kennedy's transaction. Because this evidence is direct evidence that Tucker testified falsely as to the details of the very charge Kennedy faced, the court did not abuse its discretion in permitting the question.

X

Kennedy argues the prosecutor elicited evidence of his in-custody status and gang membership. He complains during testimony McDowell unnecessarily identified him as the person with "a band on his wrist," alerting the jury to the fact he was in

custody. He also faults the prosecutor's asking McDowell what Kennedy meant by the word cuz after McDowell testified Kennedy told Tucker, "Give it to him, cuz." McDowell stated the term cuz is used by members of the Crip gang, those who want to be gang members and people from a person's neighborhood. The cuz definition was not relevant; however, there were no defense objections to the two questions which elicited it.

The reference to Kennedy's in-custody status consisted only of McDowell identifying him as "[t]he person at the defense table with a band on his wrist and goldish-brown shirt and hair straight back and goatee." McDowell does not show how he was prejudiced by these references and has waived the "gang affiliation" issue by not objecting.

XI

Kennedy argues his counsel was incompetent for failing to request that the court treat his current offense as a misdemeanor rather than a felony in order to avoid a three strikes sentence. He complains although defense counsel filed a statement in mitigation requesting the court strike his priors in the interest of justice, he failed to mention it had the authority to reduce his conviction to a misdemeanor, an authority of which the court is presumed to have been aware absent evidence to the contrary.. (Evid. Code, § 664.)

In *People v. Superior Court (Alvarez)* (1997) 14 Cal. 4th 968, 979, our Supreme Court held a trial court retains the power under section 17, subdivision (b) to reduce a "wobbler" offense from a felony to a misdemeanor under the three strikes law. In doing so, the court directed the sentencing court must consider "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the

trial.'" (*Id.* at p. 978.) The court additionally cautioned "any exercise of authority [to reduce the offense to a misdemeanor] must be an intensely fact-bound inquiry taking all relevant factors, including the defendant's criminal past and public safety, into due consideration; and the record must so reflect." (*Id.* at pp. 981-982.) There is no evidence the court was unaware of its authority under section 17 when it imposed sentence.

XII

Kennedy claims his sentence is cruel and unusual under the California and United States Constitutions because it is proportionately harsher than punishments for individuals convicted of more serious crimes.

We reject this argument. Kennedy's punishment is proportional to a habitual offender who has committed a felony and has one or more serious or violent felony convictions. Under the California Constitution, a punishment is cruel or unusual if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions human dignity. (*In re Lynch* (1972) Cal. 3d 410, 424, fn. omitted.) Proportionality is determined by examining "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (*id.* at p. 425); comparing the challenged penalty with punishments prescribed in the same jurisdiction for more *serious* offenses (*id.* at p. 426); and comparing it with penalties for the same crime in other jurisdictions (*id.* at p. 427). A penalty need not be disproportionate in all three areas to be cruel or unusual. (*People v. Dillon* (1983) 34 Cal. 3d 441, 487, fn. 38.)

Looking to the first prong on the *Lynch* test, Kennedy's personal and criminal characteristics do not suggest his sentence is cruel or unusual. He is being punished for selling a substance

in lieu of a controlled substance and for his recidivism. The fact the order in which the crimes were committed is determinative of his sentence does not make the punishment cruel or unusual. The second prong in *Lynch,* the punishment imposed is out of sync with punishment prescribed for more serious California crimes, is also not shown to have been violated. Kennedy committed serious and violent felonies in the past and has committed a new felony. His juvenile record begins with a theft offense at the age of 13, then continues to include t rue findings of burglary, battery, theft and disorderly conduct. In 1981, when Kennedy was 16, he and a companion forcibly raped a16-year old girl. Subsequent to his nine-year term for this offense, he had numerous parole violations. Kennedy's criminal history justifies his sentence under the three strikes law. As to the third prong under *Lynch,* which compares the punishment imposed with punishment, most other states have statutory schemes which provide for greater punishment for recidivists. The fact the California statutes does not require the third strike to be a serious or violent felony does not make Kennedy's punishment cruel or unusual. His constitutional argument fails.

XIII

Kennedy claims the three strikes law is unconstitutionally vague because it does not state with sufficient clarity whether pre-enactment felony convictions may be used as strikes.

We reject Kennedy's contention. We rejected this argument in *People v. Sipe* (1995) 36 Cal. App. 4th 468. We continue to adhere to the view addressed in that opinion. Kennedy has not shown himself to have been aggrieved by any perceived vagueness in the statute.

DISPOSITION

The judgment is affirmed.

/S/
WORK, Acting P.J.

WE CONCUR:

/S/
HALLER, J.

/S/
McDONALD, J.